No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, LOUISIANA, MISSOURI, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRGINIA, PAUL R. LEPAGE, GOVERNOR OF MAINE, AND PHIL BRYANT, GOVERNOR OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia, Governor Paul R. LePage of the State of Maine, and Governor Phil Bryant of the State of Mississippi.[1] The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal Executive Branch to restrict or set the terms of aliens' entry into the States for public-safety and national-security reasons, pursuant to the laws of Congress. *See Arizona v. United States*, 567 U.S. 387, 409-10 (2012). The Immigration and Nationality Act (INA) gives the Executive significant authority to suspend aliens' entry into the country. Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability under the INA to suspend the entry of aliens as he determines is in the national interest.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

The court below issued yet another injunction of the President's Proclamation[2] suspending the entry of specified classes of nonresident aliens. The injunction denies the federal government—under a statutory regime crafted by the people's representatives in Congress—the latitude necessary to make national-security, foreign-affairs, and immigration-policy judgments inherent in this country's nature as a sovereign. The injunction is contrary to law because it issued despite multiple longstanding doctrines limiting the availability of judicial remedies for disagreement with policy decisions like the Proclamation here.

I. The injunction cannot be justified on the basis that the President lacked or violated statutory authority to issue the Proclamation. *See* Pet. Br. 30-57. The Proclamation comports with Congress's scheme that grants the President sweeping power, under 8 U.S.C. § 1182(f), to restrict alien entry into the United States. Thus, in addition to the presumptions of constitutionality and good faith that apply to this government action, *see infra* Part II.B.1, the Proclamation must also be accorded "the strongest of presumptions and the widest latitude of judicial interpretation," because it is in *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

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[2] Presidential Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

II. Nor can the injunction be justified under a theory that the Proclamation is purposeful, invidious religious discrimination and therefore violates the Establishment Clause or the equal-protection component of the Fifth Amendment. *See* Pet. Br. 58-71.

A. The Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry. So neither the Establishment Clause nor the Fifth Amendment extend to the aliens covered by the Proclamation. This Court has specifically recognized that there is no "judicial remedy" to override the Executive's use of its delegated 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry into this country. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

And even assuming that the Constitution applies to nonresident aliens abroad seeking entry, the Proclamation fully complies with any possible constitutional requirements. The Proclamation publicly sets forth facially valid, bona fide national-security grounds for restricting entry to a class of nonresident aliens abroad. *See* Pet. Br. 58-64. At an absolute minimum, constitutional rights do not extend extraterritorially to "foreign nationals abroad who have no connection to the United States at all." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam) (*Trump v. IRAP*).

B. Even if the Constitution could apply to plaintiffs' claims, the injunction cannot be justified by a discriminatory-purpose challenge to the Proclamation based on purported religious animus.

1. The Court has long accorded facially neutral government actions a presumption of validity and good faith, so those actions can be invalidated under a dis-

criminatory-purpose analysis only if there is clear proof of pretext to overcome these presumptions. This longstanding, exacting standard for judicial scrutiny of government motives has been recognized by this Court in multiple types of constitutional challenges. *See infra* Part II.B.1. This limit respects institutional roles by precluding courts from engaging in a tenuous "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005). *See* Pet. Br. 64-71.

2. Plaintiffs cannot satisfy this Court's exacting standards for showing that the Proclamation is purposeful pretext masking a religious classification. The Proclamation classifies aliens according to nationality based on concerns about the government's ability to adequately vet and manage the entry for nationals of eight covered countries. That result is the culmination of months of review and input from numerous federal officials. Not only that, but several countries covered by the Proclamation were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." The Proclamation is therefore valid, as it provides a "facially legitimate and bona fide reason" for exercising the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). *See* Pet. Br. 58-64.

ARGUMENT

I. The Proclamation complies with the Immigration and Nationality Act (second question presented)

The Proclamation cannot be enjoined as unauthorized by the INA.[3] Congress, through 8 U.S.C. § 1182(f), expressly delegated to the President the authority he exercised here. And nothing in the general INA provision about issuance of a type of *visa* affects the INA's specific grant of authority to deny the *entry* of aliens as the President deems necessary in the national interest. Because the Proclamation is within *Youngstown*'s first zone of executive action—executive power conferred by Congress—it receives the "strongest of presumptions" and the burden of persuasion for plaintiffs' constitutional challenge will "rest heavily upon" plaintiffs. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

A. The Proclamation validly invokes the power assigned by 8 U.S.C. § 1182(f).

The Proclamation suspends the entry into the United States of several classes of aliens comprising certain nationals of eight listed countries, subject to some exceptions. Proclamation §§ 2, 3, 6(a). That Proclamation exercises authority that Congress expressly delegated.

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[3] Because the Proclamation fits within the President's express authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1), there is no need to address whether the President possessed sufficient independent authority under Article II of the Constitution to issue the Proclamation. *Cf.* Pet. Br. 47-48.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress too has recognized this sovereign power to exclude aliens, giving the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's broad § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding (as opposed to an entry denial), if the "revocation provides the sole ground for removal." *Id.*

2. This Court's decision in *Sale*, 509 U.S. at 187-88, forecloses any challenge to congressional authorization for the Proclamation's nationality-based suspension of

entry under § 1182(f). *Sale* held—in terms equally applicable here—that no "judicial remedy" exists to override the Executive's use of its § 1182(f) power to deny entry to specified classes of nonresident aliens. *Id.* at 188 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

Sale is fatal to any claim that the Proclamation is unauthorized by the INA. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) ... grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

Likewise here. The Proclamation cannot be enjoined on the basis that there is no sufficient finding that the entry of the excluded classes would be detrimental to the interests of the United States. *See* Pet. Br. 34-40. The President need not even disclose his "reasons for deeming nationals of a particular country a special threat," *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AADC*)—let alone disclose those reasons to a court's satisfaction. Even when the President does disclose his reasons for deeming certain nationals to present a national-security risk, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*

In all events, the Proclamation provides extensive findings supporting the need for a suspension of entry for nationals of failed states, governments that are state sponsors of terrorism, or governments otherwise unwilling or unable to respond to adequate vetting or other terrorism-related concerns. Proclamation §§ 1(g)-(j), 2(a)-(h). "[W]hen it comes to collecting evidence and drawing factual inferences" regarding determinations such as these, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Holder v. Humanitarian Law Project*, 561 U. S. 1, 34 (2010) (citation and quotation marks omitted).

3. The injunction cannot be justified on the basis that courts must read an atextual limitation into § 1182(f) to restrict the broad power Congress delegated to the President. *See* Pet. Br. 40-47. Statutes delegating broad responsibility to the President on matters affecting foreign affairs are supported by legislative practice that dates "almost from the inception of the national government." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936).

Nor can § 1182(f) be judicially narrowed to allow the President to respond only to exigent circumstances. Congress omitted any such limitation when it created § 1182(f) and later removed an exigency requirement from § 1185(a)(1). *See* Pet. Br. 41-43.

Similarly, the injunction cannot be justified on the theory that the Proclamation is not temporally limited. Section 1182(f) contains no requirement that a Presidential Proclamation suspending alien entry include a termination date at the outset. *See* Pet. Br. 40-41. Con-

sistent with the reality that the President cannot know in advance how long the adverse conditions will exist, past Presidents have suspended entry of classes of nationals without a set end date. *See* Pet. Br. 41(citing Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988)).

B. The Proclamation does not violate 8 U.S.C §§ 1152(a)(1)(A) or 1182(a).

1. Congress's broad delegation of authority to suspend the entry of classes of aliens is not undermined by 8 U.S.C. § 1152(a)(1)(A), which makes no mention of § 1182(f). Section 1152(a)(1)(A) does not address the entry of aliens into the country at all. Instead, it is part of a set of restrictions on the issuance of *immigrant visas*—that is, permission for aliens to seek admission for permanent residence. *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier nationality-based quota system for allocating immigrant visas, § 1152(a)(1)(A) provides:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict requirement for repeal by implication). An alien's *entry* into this country is a dif-

ferent and much more consequential event than the preliminary step of receiving a *visa*, which merely entitles the alien to apply for admission into the country. *See* 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. Visa possession does not control or guarantee entry; the INA provides several ways in which visa-holding aliens can be denied entry. *E.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's authority to suspend the entry of classes of aliens. 8 U.S.C. § 1182(f).

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the President suspended the entry of Cuban nationals as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 648 & n.2 (4th Cir. 2017) (en banc) (*IRAP v. Trump*) (Niemeyer, J., dissenting) (citing additional examples), *vacated as moot*, 138 S. Ct. 353 (2017). Plaintiffs point to no instance, before the past year, in which a court or the government has read § 1152(a)(1)(A)'s visa-allocation provisions as prohibiting nationality-based suspensions of entry under § 1182(f). *See, e.g.*, Pet. Br. 53-54.

Finally, § 1152(a)(1)(A) applies only to *immigrant* visas, and does not cover other prospective entrants, such as those seeking *nonimmigrant* visas to enter temporarily (and not for permanent residence). So this section cannot possibly establish that § 2 of the Proclamation is statutorily unauthorized as applied to aliens seeking entry as nonimmigrants.

2. The President's § 1182(f) authority to suspend aliens' entry is not at all limited by 8 U.S.C. § 1182(a), which also makes no mention of § 1182(f). *See* Pet. Br. 43-45. In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to this country, unless an exception applies. Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary."

As the D.C. Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not within one of the enumerated § 1182(a) categories that automatically make aliens inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).[4]

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[4] Nor are the Proclamation's travel restrictions contrary to other INA provisions that plaintiffs cite. For example, the visa-waiver program and Congress's visa-processing scheme do not contradict the Proclamation (Pet. Br. 44-45), because Congress

C. The Proclamation is within *Youngstown*'s first category: executive action pursuant to power delegated expressly by Congress

Because the Proclamation is an exercise of power delegated by Congress in the INA, it is executive action in the first *Youngstown* zone. The Order is therefore also "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674. As with the constitutional challenge in *Youngstown*, overcoming that strongest of presumptions by a constitutional challenge is a burden that rests "heavily" on plaintiffs. *Id.*; *see also IRAP v. Trump*, 857 F.3d at 655 (Shedd, J., dissenting) ("[T]o whatever extent it is permissible to examine the President's national security decision in this case, where the President has acted 'pursuant to an express or implied authorization from Congress,' the President's decision is entitled to 'the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" (quoting *Dames & Moore*, 453 U.S. at 668)).

Plaintiffs' significant burden is well-founded here not only because of the explicit congressional grant of authority to *deny* entry, 8 U.S.C. § 1182(f), but also because of the INA's complementary approach to *allowing* entry. Congress enacted "extensive and complex"

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merely set the minimum requirements for an alien to gain entry while allowing the President authority to impose additional restrictions when he deems appropriate. Pet. Br. 45.

provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 567 U.S. at 395; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress imposed these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously provided the Executive broad authority to *exclude* aliens from the country, under § 1182(f).

The Proclamation thus exercises authority that "includes all that [the President] possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). The injunction here is remarkable for interfering with a decision authorized by two branches of government in the particularly sensitive area of national security and foreign affairs: The admission of aliens into this country is a federal prerogative "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

II. The Proclamation does not violate the Establishment Clause (third question presented).

The Proclamation cannot be enjoined on constitutional grounds, whether framed under the Establishment Clause or (as plaintiffs previously presented the same attack) as an equal-protection theory. The constitutional provisions on which plaintiffs rely do not apply extraterritorially. And even if they do, the Proclamation satisfies any constitutional scrutiny that could apply by giving facially neutral, bona fide national-security grounds for its restrictions. *See* Pet. Br. 58-64.

A. The constitutional provisions invoked by plaintiffs do not extend extraterritorially; nonresident aliens abroad possess no constitutional rights regarding entry into this country.

Plaintiffs' claim that the Proclamation violates the Establishment Clause fails because that provision does not apply extraterritorially.

1. Nonresident aliens abroad have no constitutionally protected right regarding the terms on which they may enter the United States in the first place. *See Mandel*, 408 U.S. at 762. It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id.* The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Because the Constitution does not regulate immigration policy regarding foreign nationals who are neither resident nor present

in United States territory, the Court has recognized a key distinction between aliens inside versus outside the United States—according the former certain constitutional rights while not extending those rights to the latter. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Consequently, there is no "judicial remedy"—under the Constitution or statutes—to override the President's 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry. *Sale*, 509 U.S. at 188; *see id.* ("agree[ing] with the conclusion expressed in Judge Edwards' concurring opinion" regarding statutory and constitutional challenges in *Gracey*, 809 F.2d at 841: "'there is *no solution to be found in a judicial remedy*'" overriding the Executive's exercise of § 1182(f) authority (emphasis added)).

This Court has similarly long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Rather, the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

Boumediene v. Bush, 553 U.S. 723, 732-33 (2008), is not to the contrary. That case involved the lengthy detention of alien enemy-combatants at the U.S. Naval Station at Guantanamo Bay and, therefore, implicated habeas corpus and the Suspension Clause, the history of which the Court detailed. *See id.* at 739-52. The federal government here is merely denying entry into the country, not engaging in lengthy detention. *Cf. id.* at 797

("[F]ew exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person"). And unlike Guantanamo Bay, the United States lacks "plenary control, or practical sovereignty" over the countries in the Proclamation's travel restriction. *Id.* at 754; *cf. id.* at 764 ("The United States has maintained complete and uninterrupted control of the bay for over 100 years.").

Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g., Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1354 (D.C. Cir. 1997); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981). Thus, plaintiffs lack support for the notion that aliens have constitutional claims to advance here.

2. Furthermore, there is ample history of religious distinctions in the immigration context. For instance, Congress has repeatedly designated members of certain religious groups—such as Soviet Jews, Evangelical Christians, and members of the Ukrainian Orthodox Church—as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K,

§ 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation). That accepted practice underscores the inapplicability in this context of the religious-nondiscrimination rights invoked by plaintiffs.

Plaintiffs cannot make an end-run around the territorial limits on constitutional rights by relying on the alleged stigmatizing effect on individuals within the United States of a challenged decision about whether *nonresident aliens outside* this country are admitted. To hold otherwise would allow bootstrapping a constitutional claim based on government action regulating only aliens beyond constitutional protection. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated *other* persons who possessed no constitutional rights regarding entry. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing doctrine in a challenge to the expenditure of government funds in foreign countries).

3. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a separate panel of the Ninth Circuit posited that several categories of aliens, other than lawful permanent residents, may have "potential" claims to constitutional protections regarding travel and entry. *Id.* at 1166.[5] That suggestion was incorrect

[5] The *Washington* panel evaluated these claims in the context of ruling for the plaintiffs in that case on their Fifth Amendment due-process challenge. *See* 847 F.3d at 1166. That analysis, however, is equally relevant to whether the covered aliens have any

because the four categories of aliens cited by the Ninth Circuit lack valid constitutional claims.

First, there are no constitutional rights regarding prospective *reentry* for aliens who are in the United States "unlawfully." *Id.* The INA provides that visas issued to aliens seeking admission to the country confer no entitlement to be admitted, and that visas can be revoked at any time in the Executive's discretion. 8 U.S.C. § 1201(h)-(i). Even as to an alien who was admitted into the country under a visa, "revocation of an entry visa issued to an alien already within our country has no effect upon the alien's liberty or property interests," and thus cannot support a constitutional challenge. *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 212 (5th Cir. 1981).

If *removal proceedings*—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, that alien would have certain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (noting that it is "well established" that aliens have due-process rights in deportation hearings); *see also Zadvydas*, 533 U.S. at 693 (alien entitled to Fifth Amendment protections once alien is within the coun-

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Fifth Amendment rights regarding travel and entry at all. There can be no Fifth Amendment violation, whether on a due-process or equal-protection theory, if aliens covered by the Proclamation are not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

try). Accordingly, the INA provides for judicial review of visa revocations only in the limited context of deportation proceedings. 8 U.S.C. § 1201(i). But this case is not about deportation—it is about preventing nonresident aliens abroad from entering the country in the first place.[6] The Court has never held that the Constitution is violated when restrictions are placed on nonresident aliens abroad seeking to enter the country. *Cf. Landon*, 459 U.S. at 32. And because visas can be revoked unilaterally and often without judicial review, *see* 8 U.S.C. § 1201(i), it does not follow that the Constitution requires protections for aliens seeking to leave and then re-enter the country.

Second, this Proclamation does not cover any nonresident alien visa holders who travelled internationally and are attempting to reenter the country. The Proclamation applies only to aliens who were outside the United States on the effective date of the Proclamation, who did not have a valid visa on the effective date of the Proclamation, and who did not have visa that was cancelled or revoked under Executive Order 13,769 of January 27, 2017. Proclamation §§ 3(a), 6(d). Regardless, *Landon* does not establish that "non-immigrant visaholders" have constitutional rights to reentry when seeking to return from abroad. *See Washington*, 847

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[6] This claim is particularly weak for unlawfully present aliens. Even if unlawfully present aliens have certain constitutional rights in *removal proceedings*, *see Zadvydas*, 533 U.S. at 693, that does not mean that an unlawfully present alien who leaves the country has a right to process to be admitted to the country upon return. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B) (inadmissibility based on prior unlawful presence), (f).

F.3d at 1166 (citing *Landon*, 459 U.S. at 33-34). *Landon* involved a *resident* alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34. Those ties are significantly weaker in the case of a *nonresident* alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review . . . of a revocation" of a visa, "except in the context of a removal proceeding if such revocation provides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

Third, there are no viable constitutional rights for aliens abroad to seek refugee status. *See Washington*, 847 F.3d at 1166. That argument morphs statutory protections for those seeking asylum into constitutional protections for refugees. The INA's conferral of statutory rights to seek asylum, *see* 8 U.S.C. § 1158, cannot create constitutionally protected rights for refugee admission. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." 8 U.S.C. § 1158(a)(1). Only an alien *outside* the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). Hence, § 1182(f) independently permits the Executive to deny refugee applicants entry into the United States. Simi-

larly, statutory provisions under the United Nations Convention Against Torture (CAT) provide that certain aliens may not be returned to a country in which they fear torture, "regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note. The CAT provisions, however, merely limit the possible countries to which an alien can be *returned* and say nothing about overriding the President's statutory authority to restrict alien *entry* into the United States, even if aliens cannot be returned to a certain other country. *See id.* § 1182(f).

Fourth, plaintiffs lack viable constitutional arguments based on visa applicants who have a relationship with a U.S. resident or institution. *See Washington*, 847 F.3d at 1166 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762–65). *Din* did not hold that such rights exist. To the contrary, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment); *see also* Pet. Br. 62-63. In fact, the concurrence reasoned that, even if the Fifth Amendment applied in this context, the only possible constitutional requirement was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad. *Din*, 135 S. Ct. at 2141; *see also id.* at 2131 (plurality op.) ("[A]n unadmitted and nonresident alien . . . has no right of entry into the United States, and

no cause of action to press in furtherance of his claim for admission.").

The *Din* concurrence's standard is plainly met here by the Proclamation's lengthy recitation of national-security reasons. *See* Proclamation §§ 1-2. The Proclamation therefore satisfies whatever constitutional scrutiny could possibly apply to entry denials, as it publicly announces the "facially legitimate and bona fide" invocation of the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770.

B. Even if Establishment Clause review did apply, plaintiffs do not overcome this Court's exacting standard for finding an unlawful government purpose.

As this Court has recognized for years and in many different contexts, a facially neutral government action can be invalidated as pretext for a discriminatory purpose only upon a clear showing. That high standard respects the "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted); *see also* Pet. Br. 68. And that presumption cannot be overcome by plaintiffs' arguments here. The Proclamation's travel restrictions classify aliens by nationality and not religion. That is not invidious pretext—especially given the Proclamation's detailed national-security findings, the resonance of those findings in determinations of nu-

merous federal officials, and the judicial deference owed to executive decisions in this context.

1. Government action cannot be deemed discriminatory pretext absent clear proof overcoming the presumptions of constitutionality and good faith.

A discriminatory-purpose challenge to facially neutral government action faces an exacting standard under this Court's precedents: it requires clear proof of invidious pretext.

a. This exacting standard for discriminatory-purpose challenges is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *Triplett*, 494 U.S. at 721.

And this presumption of constitutionality applies with particular force to the foreign-affairs and national-security determinations at issue here. *See AADC*, 525 U.S. at 491-92. After all, "[u]nlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797. Indeed, "the Government's interest in enforcing" the Proclamation's travel restrictions "and

the Executive's authority to do so" extend from the government's "interest in preserving national security[, which] is 'an urgent objective of the highest order.'" *Trump v. IRAP*, 137 S. Ct. at 2088 (quoting *Humanitarian Law Project*, 561 U.S. at 28). The presumption of constitutionality is especially strong as to executive action regarding nonresident aliens abroad who seek entry to the country without existing ties to U.S. residents or entities, since the President's national-security powers are "undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.*

b. Consequently, this Court "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). The Court has therefore permitted a discriminatory-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted a discriminatory-purpose analysis of government action, this Court has concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained for the Court over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing. 6 Cranch at 128.

The Court has thus repeatedly explained, in various contexts, that courts can override facially neutral gov-

ernment actions as pretext only upon clear proof. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).
- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).
- "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make little "practical sense." *McCreary Cty.*, 545 U.S. at 862.

This exacting standard for a discriminatory-purpose challenge to facially neutral government action exists for good reason. It ensures that a purpose inquiry will

remain judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed ... and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

2. There is not clear proof that the Proclamation, which classifies aliens by nationality and reflects national-security concerns, is a pretext for a religious test.

The Proclamation's travel restrictions classify aliens by nationality—not religion.[7] The Proclamation's sus-

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[7] Because the Proclamation classifies aliens by nationality, and not religion, any equal-protection analysis possibly applicable under the Constitution, *but see supra* Part II.A, subjects the Proclamation to no more than rational-basis review. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain benefits on aliens from particular countries who are applying for lawful-permanent-residence status. *See, e.g., id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immi-

pension of entry by certain nationals from eight countries neither mentions any religion nor depends on whether affected aliens are Muslim. *See* Presidential Proclamation §§ 2, 3. These provisions distinguish among aliens only by nationality. *Id.*; *see also* Pet. Br. 65-71.

The Proclamation therefore is emphatically not a "Muslim ban." The Proclamation includes two non-majority-Muslim countries (North Korea and Venezuela), and excludes two majority-Muslim countries (Iraq and Sudan) that were covered by the President's previous entry suspensions. Data from the Pew-Templeton Global Religious Futures Project indicates that the countries covered by the Proclamation contain fewer than 9% of the world's Muslims.[8] The eight covered countries—Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia—are identified as "Countries of Identified Concern," from which entry is suspended or limited as "detrimental to the interests of the United States." Proclamation pmbl., § 2. Six of these countries were already included in the list of seven countries created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

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grant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

[8] *See Muslim Population by Country: 2010*, Pew-Templeton Global Religious Futures Project (last visited Feb. 27, 2018), http://www.globalreligiousfutures.org/religions/muslims (providing statistics on Muslim population as a percentage of total population on a per-country basis).

The manifestly legitimate rationale for suspending entry for certain nationals (*see* Proclamation §§ 1-2) includes "each country's capacity, ability, and willingness to cooperate with [U.S.] identity-management and information-sharing policies and each country's risk factors," and "foreign policy, national security, and counterterrorism goals." Proclamation § 1(h)(i). The proclamation reflects the "country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur." *Id.*

Moreover, before the current Administration took office, numerous federal officials—including the FBI Director,[9] the Director of National Intelligence,[10] and the Assistant Director of the FBI's Counterterrorism Division[11]—expressed concerns about the country's current ability to vet alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[12] and

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[9] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

[10] *Id.*

[11] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[12] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-

"groups like ISIS may seek to exploit the current refugee flows."[13] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists have been recognized since the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).[14]

Given this national-security grounding, a challenge to the Proclamation as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the sensitive policy judgments inherent in the Proclamation. These decisions account for factors indicating a heightened national-security risk that warrants a particular course of action regarding the Nation's borders. Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797; *AADC*, 525 U.S. at 491. When it comes to deciding the best way to use a sovereign's power over

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content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[13] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terror Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

[14] *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Proclamation's detailed explanation of its national-security basis, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 27-29, and (3) the exacting standard for deeming facially neutral government action pretext for a discriminatory purpose, *see supra* Part II.B.1; *see also* Pet. Br. 65-71. Furthermore, this Court has recognized the limited significance of campaign statements made before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). And comments made by nongovernment officials are irrelevant for determining whether the Executive Branch took action as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

In short, even if the constitutional provisions at issue could somehow apply extraterritorially to nonresident aliens abroad seeking entry, there is still no constitutional violation from the Proclamation's limits on the entry of nonresident aliens abroad. Whether under the Establishment Clause or the Fifth Amendment, plaintiffs' claims would still fail because the Proclamation satisfies any constitutional scrutiny that could possibly apply. The Proclamation's "facially legitimate and bona fide reason" for the exclusion of the covered aliens, *Mandel*, 408 U.S. at 770, demonstrates that its purpose was to achieve national-security and foreign-policy

goals, not to effectuate anti-Muslim bias. *See supra* pp. 27-29; *see also* Pet. Br. 65.

Considering not only the presumption of validity and good faith accorded to facially neutral government action, but also the strongest of presumptions under *Youngstown* because the INA authorizes the Proclamation, the Executive easily provided a "facially legitimate and bona fide reason" for the Proclamation. *Mandel*, 408 U.S. at 770. Courts therefore must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Id.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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